Supreme Court, U.S.
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No. _____

In The

Supreme Court of the United States

October Term, 1994

LANG FONG PRITCHETT,

Petitioner,

versus

IMMIGRATION AND NATURALIZATION SERVICE,

Respondent.

Petition For Writ Of Certiorari
To The United States Court Of Appeals
For The Fifth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

The Immigration Act of 1990 ("IMMACT") reorganized and rewrote 8 U.S.C. Sect. 1251, adding some new grounds of deportability and dropping others. IMMACT's amendments were specifically made applicable only in deportation proceedings commenced on or before March 1, 1991. A savings clause was included, stating that aliens fomerly subject to several specified deportation grounds deleted by IMMACT would nonetheless remain deportable.

The question presented is:

In immigration proceedings commenced before March 1, 1991, does an alien ordered deported under a ground of deportability deleted by IMMACT remain deportable, where said ground of deportability is not among those explicitly preserved in IMMACT's savings clause?

TABLE OF CONTENTS

Page

Question Presented i

Table of Contents ii

Table of Authorities iii

Opinions and Judgments Below 2

Statement of Jurisdiction 2

Statutes Involved 2

Statement of the Case 4

I. Basis for Federal Jurisdiction in the Court of First Instance 4

II. Statement of Facts 4

III. Proceedings Below 5

Reasons for Granting the Writ 7

Argument 7

I. The statutory subsection under which Ms. Pritchett was found deportable has been repealed 7

II. While Ms. Pritchett was concededly formerly deportable under former INA Sect. 241(a)(5), former 8 U.S.C. Sect. 1251(a)(5), she is no longer deportable due to the amendment of said statute, as now recodified at INA Sect. 241(a)(3)(B)(iii), 8 U.S.C. Sect. 1251(a)(3)(B)(iii) 12

Conclusion 16

Appendix ..... App. 1

TABLE OF AUTHORITIES

Page

CASES:

Bouis v. Aetna Cas. & Sur. Co., 91 F. Supp. 954, *reh'g denied*, 97 F. Supp. 236 (W.D.La. 1950) 9

Cannon v. University of Chicago, 441 U.S. 677 (1979) 9

Conroy v. Aniskoff, 113 S. Ct. 1562 (1993) 9

Fong Haw Tan v. Phelan, 333 U.S. 6 (1948) 11

INS v. Nat'l Center for Immigrants' Rights, Inc., 112 S. Ct. 551 (1991) 10

Johnson v. U.S., 225 U.S. 405 (1912) 9

McElroy v. U.S., 455 U.S. 642, *reh'g denied*, 456 U.S. 965 (1982) 9

Platt v. Union Pacific R. Co., 99 U.S. 48 (1878) 9, 13

Pritchett v. INS, 993 F.2d 80, (5th Cir.), *cert. denied*, 114 S. Ct. 345 (1993) 6

U.S. v. Campos-Serrano, 404 U.S. 293 (1971) 8, 9

U.S. v. Dickerson, 310 U.S. 554 (1940) 9

U.S. v. Tamayo, 427 F. 2d 1072 (9th Cir. 1970) 10

U.S. v. Wallington, 889 F. 2d 573 (5th Cir. 1989) 10

U.S. Nat. Bank of Or. v. Independent Ins. Agents, 113 S. Ct. 2173 (1993) 10

ADMINISTRATIVE DECISIONS:

Matter of Arthur, Interim Decision 3173 (BIA 1992) 6

Matter of B-, 5 I&N Dec. 255 (BIA 1953) 13, 14, 15

Matter of R-, 5 I&N Dec. 463 (BIA 1953) 15

Matter of Wadud, 19 I&N Dec. 182 (BIA 1984) 10

TABLE OF AUTHORITIES – Continued

Page

FEDERAL STATUTES:

United States Code:

Former 8 U.S.C. Sect. 1251(a)(5) ..... *passim*

Former 8 U.S.C. Sect. 1251(a)(6) 13

8 U.S.C. Sect. 1105a(a) 4

8 U.S.C. Sect. 1154(c) 4

8 U.S.C. Sect. 1182(h) 6

8 U.S.C. Sect. 1251(a)(3)(B)(iii) 3, 5, 8, 10, 11, 12

8 U.S.C. Sect. 1253(a) 5

18 U.S.C. Sect. 1001 11

18 U.S.C. Sect. 1546 ..... *passim*

28 U.S.C. Sect. 1254(1) 2

Immigration and Nationality Act:

Former INA Sect. 241(a)(5) ..... *passim*

Former INA Sect. 241(a)(6) 13

INA Sect. 204(c) 4

INA Sect. 212(h) 6

INA Sect. 241(a)(3)(B)(iii) 5, 8, 10, 11, 12

INA Sect. 243(a) 5

TABLE OF AUTHORITIES – Continued

Page

Other Statutes:

Immigration Act of 1990, Pub. L. No. 101-649, 104 Stat. 4978 ("IMMACT") 8

Immigration Reform and Control Act of 1986, Pub. L. 99-603, 100 Stat. 3359 ("IRCA") 8

COURT RULES:

SUP. CT. R. 20.1 2

FEDERAL REGULATIONS:

8 CFR Sect. 103.2(b) 5

SECONDARY SOURCES:

C. GORDON AND S. MAILMAN, IMMIGRATION LAW AND PROCEDURE 10, 12

U.S. Code Cong. & Ad. News 8

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October Term, 1994

LANG FONG PRITCHETT,

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versus

IMMIGRATION AND NATURALIZATION SERVICE,

Respondent.

Petition For Writ Of Certiorari
To The United States Court Of Appeals
For The Fifth Circuit

PETITION FOR WRIT OF CERTIORARI

TO THE HONORABLE CHIEF JUSTICE AND THE ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES,

MAY IT PLEASE THE COURT:

Petitioner, Lang Fong Pritchett, respectfully prays that a Writ of Certiorari issue to review the Opinion and Judgments of the United States Court of Appeals for the Fifth Circuit entered in this matter on July 6, 1994.

OPINIONS AND JUDGMENTS BELOW

The opinion and judgment of the three-judge panel of the United States Court of Appeals for the Fifth Circuit, entered on July 6, 1994, are reprinted in the Appendix to this Petition at pages App. 1 through App. 10. The decision and order of the Board of Immigration Appeals, filed November 22, 1993, are reprinted in the Appendix at pages App. 11 through App. 13. The decision and order of the Immigration Judge, filed February 22, 1988, are reprinted in the Appendix at page App. 14.

STATEMENT OF JURISDICTION

The judgment of the United States Court of Appeals for the Fifth Circuit was entered on July 6, 1994, affirming the Board of Immigration Appeals' decision dated November 22, 1993. The jurisdiction of this Court is invoked under 28 U.S.C. Sect. 1254(1) and SUP. CT. R. 20.1.

STATUTES INVOLVED

This case involves the following provisions of the United States Code:

Former 8 U.S.C. Sect. 1251(a)(5)

(a) Any alien in the United States (including an alien crewman) shall, upon the order of the Attorney General, be deported who – [. . .]

(5) has failed to comply with the provisions of section 265 unless he establishes to the satisfaction of the Attorney General that such failure was reasonably excusable or was not willful, or has been convicted under section 266(c) of this title, or under section 36(c) of the Alien Registration Act, 1940, or has been convicted of violating or conspiracy to violate any provision of the Act entitled "An Act to require the registration of certain persons employed by agencies to disseminate propaganda in the United States, and for other purposes", approved June 8, 1938, as amended, or has been convicted under section 1546 of title 18 of the United States Code [. . .]

Current 8 U.S.C. Sect. 1251(a)(3)(B)(iii)

(a) CLASSES OF DEPORTABLE ALIENS. – Any alien (including an alien crewman) in the United States shall, upon the order of the Attorney General, be deported if the alien is within one or more of the following classes of deportable aliens: [. . .]

(3) FAILURE TO REGISTER AND FALSIFICATION OF DOCUMENTS. – [. . .]

(B) FAILURE TO REGISTER OR FALSIFICATION OF DOCUMENTS. – Any alien who at any time has been convicted – [. . .] (iii) of a violation of, or a conspiracy to violate, section 1546 of title 18, United States Code (relating to fraud and misuse of visas, permits, and other entry documents), [. . .] is deportable.

STATEMENT OF THE CASE

I. Basis for Federal Jurisdiction in the Court of First Instance

Lang Fong Pritchett herein seeks review of the decision by the Court of Appeals for the Fifth Circuit on her Petition for Review taken from the administrative decision by the Board of Immigration Appeals ("BIA") in deportation proceedings. The Fifth Circuit's jurisdiction was invoked under 8 U.S.C. Sect. 1105a(a), which establishes the exclusive procedure for judicial review of such administrative decisions.

II. Statement of Facts

Petitioner Lang Fong Pritchett, a native and citizen of Malaysia, entered the U.S. legally on August 11, 1980, as a nonimmigrant student. On October 13, 1983, she married Aremnie Royer, a U.S. citizen. She was convicted on September 24, 1986, under 18 U.S.C. Sect. 1546, for having claimed on an Immigration and Naturalization Service ("INS") Form I-485 adjustment of status application that she was living with Mr. Royer, when in fact she was not. On May 22, 1987, Ms. Pritchett married Pete Pritchett, her current husband, who is also a U. S. citizen. Mr. Pritchett filed an INS Form I-130 immediate relative visa petition (hereinafter "I-130 petition") on behalf of Ms. Pritchett on January 3, 1991.

Mr. and Ms. Pritchett's I-130 petition was denied on May 20, 1992, under INA Sect. 204(c), 8 U.S.C. Sect. 1154(c), based upon alleged evidence showing Ms. Pritchett's marriage to Mr. Royer had been fraudulent. Mr. and

Ms. Pritchett appealed said denial to the BIA on May 27, 1992, noting that the denial illegally failed to provide them with a copy of the supposed evidence upon which it was based and an opportunity for rebuttal, as required under 8 CFR Sect. 103.2(b), and that the BIA was precluded from judging the validity of the fraud allegation for lack of any evidence in the appeal record. On March 7, 1994, the BIA sustained the appeal and remanded the matter to INS to allow Mr. and Ms. Pritchett to review and rebut the alleged derogatory evidence. INS has taken no further action on the I-130 petition.

III. Proceedings Below

INS issued an Order to Show Cause to Ms. Pritchett on September 24, 1986, charging her with deportability under former INA Sect. 241(a)(5), former 8 U.S.C. Sect. 1251(a)(5) (now codified at INA Sect. 241(a)(3)(B), 8 U.S.C. Sect. 1251(a)(3)(B)), based upon her 18 U.S.C. Sect. 1546 conviction. She was found so deportable, whereupon she exercised her statutory right under INA Sect. 243(a), 8 U.S.C. Sect. 1253(a), to direct deportation to the country of her choice, designating Honduras. The Immigration Judge ("IJ") refused to honor her designation, and ordered her deported to Malaysia.

On March 2, 1988, Ms. Pritchett appealed her deportation order to the BIA, based upon the Immigration Judge's refusal to order deportation to Honduras, and upon various other grounds. The BIA dismissed the appeal on April 17, 1992. It agreed, however, that the

Immigration Judge erred in refusing to honor Ms. Pritchett's country designation, and it accordingly ordered her deported to Honduras.

On May 4, 1992, Ms. Pritchett filed a motion to reopen with the BIA, seeking adjudication of an I-130/I-485 adjustment of status claim based upon her current marriage. She also included an INS Form I-601 application for a waiver (under INA Sect. 212(h), 8 U.S.C. Sect. 1182(h)) of excludability based upon her conviction, in order to show prima facie eligibility for adjustment. The BIA denied said motion on July 17, 1992, citing its intervening decision in *Matter of Arthur*, Interim Decision No. 3173 (BIA 1992). The Court of Appeals for the Fifth Circuit upheld the BIA's decision on June 14, 1993. *Pritchett v. INS*, 993 F.2d 80 (5th Cir. 1993). The Supreme Court subsequently denied certiorari. *Pritchett v. INS*, 114 S. Ct. 345 (1993).

Ms. Pritchett moved the BIA for reconsideration on June 24, 1993, this time arguing that due to a 1990 amendment and recodification of former INA Sect. 241(a)(5), former 8 U.S.C. Sect. 1251(a)(5), she was no longer deportable as charged under said statute. The BIA denied this motion on November 22, 1993, holding that the amendment in question did not affect Ms. Pritchett's case, since she had been charged and found deportable under the old version of the statute. The Fifth Circuit affirmed the BIA's decision on July 6, 1994, and the present certiorari petition was then filed.

REASONS FOR GRANTING THE WRIT

The Fifth Circuit's decision in the present matter raises troubling issues regarding the retroactivity of ameliorative legislation, or, put another way, regarding the continuing applicability of repealed statutes. As further elaborated below, Ms. Pritchett stands to be expelled from this country on grounds that are nowhere to be found in current deportation statutes, a result forbidden by the BIA's own precedent cases. Congress is continually revising U.S. immigration laws, discarding outmoded deportation grounds and devising new ones. The implications of this case therefore reach far beyond Ms. Pritchett's own threatened suffering and that of her U.S. citizen husband, since based on the Fifth Circuit's approach, anyone formerly subject to deportation on grounds that Congress has since seen fit to eliminate still faces expulsion.

ARGUMENT

I. The statutory subsection under which Ms. Pritchett was found deportable has been repealed.

At the time that Ms. Pritchett was found deportable under former INA Sect. 241(a)(5), former 8 U.S.C. Sect. 1251(a)(5), said statute applied to "[a]ny alien . . . who . . . has been convicted under section 1546 of title 18 of the United States Code." 18 U.S.C. Sect. 1546, at that time, bore the title "Fraud and misuse of visas, permits, and other entry documents." Prior to the amendment of former INA Sect. 241(a)(5), former 8 U.S.C. Sect. 1251(a)(5), the language of 18 U.S.C. Sect. 1546 referring

to "entry documents" was the subject of various lawsuits. In 1976 the Supreme Court ruled that possession of a fraudulent "green card" was not punishable under the statute, since such card is not an entry document. *U.S. v. Campos-Serrano*, 404 U.S. 293 (1971). One of the enforcement-minded provisions of the Immigration Reform and Control Act of 1986, Pub. L. 99-603, 100 Stat. 3359 (Nov. 6, 1986) ("IRCA") closed this perceived loophole, however, by broadening the applicability of 18 U.S.C. Sect. 1546 to include "border crossing card[s], alien registration receipt card[s], or other document[s] prescribed by statute or regulation for entry into or as evidence of authorized stay or employment in the United States." The statute's title was also amended to read: "Fraud and misuse of visas, permits, and other documents." *See* IRCA Sect. 103(a).

In 1990, Congress completely revised and recodified INA Sect. 241, 8 U.S.C. Sect. 1251, which sets forth the various grounds of deportability. *See* Immigration Act of 1990, Pub. L. 101-649, 104 Stat. 4978 (Nov. 29, 1990) ("IMMACT"). The stated legislative intent behind IMMACT's wholesale amendment of the statute was to effect "a comprehensive revision of all the existing grounds for exclusion and deportation, *including the repeal of outmoded grounds . . .* " (emphasis supplied). *See* 1978 U.S. Code Cong. & Ad. News 6793.

Among other changes, IMMACT amended the above-quoted language of former INA Sect. 241(a)(5), former 8 U.S.C. Sect. 1251(a)(5), so that it now reads, as currently codified at INA Sect. 241(a)(3)(B)(iii), 8 U.S.C. Sect. 1251(a)(3)(B)(iii), as follows: "[a]ny alien who at any time has been convicted . . . of a violation of, or a conspiracy to

violate, section 1546 of title 18, United States Code (*relating to fraud and misuse of visas, permits, and other entry documents*)" (emphasis supplied). *See* IMMACT Sect. 602(a). It is maintained herein that by virtue of this change, the scope of this deportation statute has been limited so that it no longer reaches 18 U.S.C. Sect. 1546 convictions, such as that of Ms. Pritchett, that do *not* relate to "visas, permits, and other entry documents."

There appears no other reasonable explanation for Congress's use of the very language at issue in *Campos-Serrano* to amend former INA Sect. 241(a)(5), former 8 U.S.C. Sect. 1251(a)(5), than that it intended thereby to limit the statute's reach. When Congress adds restrictive language to a statute it is presumed to have restrictive intent. *Bouis v. Aetna Cas. & Sur. Co.*, 91 F. Supp. 954, 958, *reh'g denied*, 97 F. Supp. 236 (W.D.La. 1950). Congress is further presumed to legislate with full knowledge of existing law, including judicial glosses; such presumption applies a fortiori where, as here, the Supreme Court itself has glossed the issue. *Conroy v. Aniskoff*, 113 S. Ct. 1562, 1566 (1993); *Cannon v. University of Chicago*, 441 U.S. 677, 696-97 (1979).

If Congress did not intend in IMMACT to restrict former INA Sect. 241(a)(5), former 8 U.S.C. Sect. 1251(a)(5), the language it added would be mere surplus verbiage. Relevant caselaw overwhelmingly rejects such an interpretation. *See, e.g., Platt v. Union Pacific R. Co.*, 99 U.S. 48, 58 (1878). The fact that the statutory language was changed implies a change in purpose, an implication which must be overcome by persuasive evidence to the contrary. *McElroy v. U.S.*, 455 U.S. 642, 651 n.13 (citing *Johnson v. U.S.*, 225 U.S. 405, 415 (1912), and *U.S. v.*

Dickerson, 310 U.S. 554, 561 (1940)), *reh'g denied*, 456 U.S. 965 (1982). Research discloses no such evidence.

IMMACT also changed former INA Sect. 241(a)(5), former 8 U.S.C. Sect. 1251(a)(5) by grouping it, as now recodified at INA Sect. 241(a)(3)(B)(iii), 8 U.S.C. Sect. 1251(a)(3)(B)(iii), under the rubric of "Failure to Register or Falsification of Documents," as set forth in INA Sect. 241(a)(3)(B), 8 U.S.C. Sect. 1251(a)(3)(B). It has long been held that the title and heading are useful referents in construing an ambiguous statute. *U.S. Nat. Bank of Or. v. Independent Ins. Agents*, 113 S. Ct. 2173, 2184 (1993); *INS v. Nat'l Center for Immigrants' Rights, Inc.*, 112 S. Ct. 551, 556 (1991); *see also U.S. v. Wallington*, 889 F. 2d 573, 577 (5th Cir. 1989). The fact that Ms. Pritchett was convicted neither for failing to register nor for falsifying documents therefore further militates against deportability in the present case.

The deportation statute here at issue has been characterized by the leading commentator as a "severe mandate." 3 C. Gordon & S. Mailman, Immigration Law and Procedure Sect. 71.07[2][a] (rev. ed. 1993). It potentially reaches an extremely wide and ill-defined range of misconduct, due to the vagueness of the underlying criminal statute, 18 U.S.C. Sect. 1546. *See U.S. v. Tamayo*, 427 F. 2d 1072, 1073 (9th Cir. 1970) (labeling 18 U.S.C. Sect. 1546 a "masterpiece of obfuscation"). It encompasses acts of a relatively innocuous nature compared, for instance, with serious drug offenses. Yet a serious drug crime may be waived for immigration purposes, while there is no waiver for INA Sect. 241(a)(3)(B)(iii), 8 U.S.C. Sect. 1251(a)(3)(B)(iii). *Matter of Wadud*, 19 I&N Dec. 182, 185-86 (BIA 1984).

The Supreme Court has emphatically ruled that ambiguous immigration statutes are to be construed in favor of the alien, due to the severe hardship deportation entails. *Fong Haw Tan v. Phelan*, 333 U.S. 6, 10 (1948). The present case is a prime example of the disproportionately harsh consequences threatened by this particular deportation statute, involving as it does a relatively minor infraction and the threat to an admittedly good-faith marriage involving a U.S. citizen. While it is submitted, as argued above, that relevant jurisprudence clearly requires a finding that the deportation statute here at issue does not apply to Ms. Pritchett, the statute is at best ambiguous, and thus cannot support her deportation under *Fong Haw Tan*.

Furthermore, the misconduct that it is argued is now no longer reached by INA Sect. 241(a)(3)(B)(iii), 8 U.S.C. Sect. 1251(a)(3)(B)(iii) (i.e., false statements generally), can be prosecuted as easily under 18 U.S.C. Sect. 1001, which does not always lead to deportability (and which is waivable in any event), as under 18 U.S.C. Sect. 1546. The interpretation herein advanced on behalf of Ms. Pritchett thus avoids the potential for disparate punishment under the immigration laws for equivalent offenses, depending on prosecutorial whims.

INS effectively conceded this issue in the present matter, as it never argued that Ms. Pritchett would be deportable if charged now under current INA Sect. 241(a)(3)(B)(iii), 8 U.S.C. Sect. 1251(a)(3)(B)(iii); it maintained instead that any amendment made by IMMACT was of no effect due to IMMACT's specification that it was to apply only in proceedings commenced after March 1, 1991.

II. While Ms. Pritchett was concededly formerly deportable under former INA Sect. 241(a)(5), former 8 U.S.C. Sect. 1251(a)(5), she is no longer deportable due to the amendment of said statute, as now recodified at INA Sect. 241(a)(3)(B)(iii), 8 U.S.C. Sect. 1251(a)(3)(B)(iii).

As noted above, the intent of Congress in IMMACT was to repeal outmoded deportation grounds. Among the grounds repealed were those based on membership in Communist or other perceived subversive groups, and also those based on certain medical conditions. *See* 1 C. Gordon & S. Mailman, Immigration Law and Procedure Sect. 2.04[11][h][ii] (rev. ed. 1993). It is maintained herein that the ground under which Ms. Pritchett was found deportable was also among the grounds repealed.

The BIA did not address this issue, agreeing instead with INS that, regardless of whether Ms. Pritchett could be deported if charged now under current INA Sect. 241(a)(3)(B)(iii), 8 U.S.C. Sect. 1251(a)(3)(B)(iii), based on her particular type of conviction under 18 U.S.C. Sect. 1546, her case is perforce governed by former 241(a)(5), former 8 U.S.C. Sect. 1251(a)(5). The BIA cited IMMACT Sect. 602(d), which states that the amendments to INA Sect. 241 "shall not apply to deportation proceedings for which notice has been provided to the alien before March 1, 1991."

The BIA's decision begged the question of whether deportability, once established under an applicable pre-IMMACT ground, continues after the ground is *repealed* by IMMACT. It is submitted that an affirmative answer to this question would lead to absurd and untenable results.

For instance, some individuals were formerly ordered deported under outmoded "Cold War" grounds for merely being affiliated in the U.S. with the Communist "or other totalitarian" political parties. *See* former INA Sect. 241(a)(6), former U.S.C. Sect. 1251(a)(6). In IMMACT, Congress recognized the unfairness of these provisions, abolished them as outmoded, and concentrated instead on realistic threats to national security. Under the BIA's approach in the present matter, individuals formerly found deportable on the outmoded, discredited grounds would still have to be deported, even though the grounds had since been discarded.

Ms. Pritchett argued to the Fifth Circuit panel that the BIA's position in the present case was belied by the inclusion in IMMACT of a savings clause which explicitly provides that individuals previously found deportable under certain deportation grounds removed by IMMACT shall remain so deportable despite such amendment. IMMACT Sect. 602(c). The approach taken by the BIA would render this savings clause completely superfluous, a result prohibited under *Platt, supra.* The only sensible reading of this savings clause is that Congress clearly presumed that anyone formerly deportable on grounds removed by IMMACT would *not* be considered to remain so deportable absent a similar savings provision. As there is no savings clause relating to the ground on which she was found deportable, Ms. Pritchett may not be deported now that said ground has been repealed.

The BIA itself previously endorsed the approach advocated in the present case by Ms. Pritchett, as she noted in her reply brief to the Fifth Circuit. In *Matter of B-*, 5 I&N Dec. 255 (BIA 1953), the respondent therein had

been a member of the German Nazi Party prior to U.S. entry. He was charged with deportability under the Immigration and Nationality Act of 1918, as amended by the Internal Security Act of 1950. Under said provisions, membership in a totalitarian party of a foreign state triggered deportability without further inquiry. *Id.* at 256. The Immigration and Nationality Act of 1952, however, limited the scope of this deportation ground to cover only those who advocate the establishment in the U.S. of a totalitarian government. *Id.* The BIA framed the issue involved as "whether the respondent, who is not deportable under the present provisions of law because of former membership in the Nazi Party, is nevertheless deportable under the provisions of a repealed statute." *Id.* at 257.

The issue in *B-* was further complicated by Congress's inclusion of a savings clause in section 405(a) of the Immigration Act of 1952, stating:

> "Nothing contained in this act, unless otherwise specifically provided therein, shall be construed to affect the validity of . . . any warrant of arrest, order or warrant of deportation, . . . which shall be valid at the time this act shall take effect; or to affect any . . . proceedings . . . brought . . . ; but as to all such . . . proceedings . . . the statutes or parts of statutes repealed by this act are, unless otherwise specifically provided therein, hereby continued in force and effect."

Id. (ellipses in original).

The BIA held in *B-* that, although the respondent therein was deportable under the previous version of the relevant statute, he could no longer be deported because

of the 1952 amendment, despite the seemingly applicable savings clause. It reasoned as follows: "we do not believe that we should ignore the plain mandate of Congress that a member or former member of a totalitarian party is not to be deported if such totalitarian party did not advocate the establishment of a totalitarian dictatorship in the United States." *Id.*

In another case of patent relevance in the present matter, which was also cited to the Fifth Circuit by Ms. Pritchett, deportability was charged based on inadmissibility at the time of entry. *Matter of R-*, 5 I&N Dec. 463 (BIA 1953). The previously applicable excludability ground had been repealed by the time deportation proceedings were brought, and the respondent in *R-* therefore would have been admissible had he sought to enter at such later time. *Id.* at 465. The BIA held that deportability could not be sustained in such a situation. *Id.* at 465 n.4 and accompanying text (citing cases similarly holding, where deportability charges based on since-revoked bars to naturalization).

The Fifth Circuit failed even to mention *B-* and *R-* in its decision. Rather, it simply echoed the BIA's conclusion that since Ms. Pritchett's immigration proceedings were nominally governed by the pre-IMMACT statutory scheme, under IMMACT's effective date provision, it made no difference to her case whether IMMACT had repealed the grounds on which she was ordered deported.

The Fifth Circuit's decision was clearly erroneous, and, as noted above, stands to lead to many more erroneous decisions if left undisturbed. Ms. Pritchett and her

U.S. citizen husband face severe and undeserved hardship if the present petition is not granted.

CONCLUSION

For the reasons set forth hereinabove, a writ of certiorari should issue to review the opinion and judgment of the United States Court of Appeals for the Fifth Circuit.

Respectfully submitted,

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UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 93-5546
Summary Calendar

LANG FONG PRITCHETT,

Petitioner,

versus

IMMIGRATION AND NATURALIZATION SERVICE,

Respondent.

Petition for Review of an Order
of the Board of Immigration Appeals
(INS No. A26-443-195)

(Filed July 6, 1994)

Before KING, HIGGINBOTHAM, and BARKSDALE, Circuit Judges.

PER CURIAM:[1]

Lang Fong Pritchett petitions for review of a decision of the Board of Immigration Appeals denying her motion

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[1] Local Rule 47.5.1 provides: "The publication of opinions that have no precedential value and merely decide particular cases on the basis of well-settled principles of law imposes needless expense on the public and burdens on the legal profession." Pursuant to that rule, the court has determined that this opinion should not be published.

to reconsider an order of deportation. We DENY the petition.

I.

Pritchett, a native and citizen of Malaysia, entered the United States in 1980 on a non-immigrant visa. *Pritchett v. I.N.S.*, 993 F.2d 80, 81 (5th Cir.), *cert. denied*, ___ U.S. ___, 114 S. Ct. 345 (1993). In October 1983, Pritchett married Aremnie Royer, a United States citizen. *Id.* at 82. Royer filed an immediate relative visa petition on Pritchett's behalf, and she submitted an application for adjustment of status in which she stated that she and Royer were living together as husband and wife. *Id.*

Pritchett filed for divorce from Royer in June 1985. *Id.* An investigation revealed that her marriage to Royer was fraudulent, and that they had never resided together as husband and wife. *Id.* In June 1986, Pritchett was charged with violating 18 U.S.C. §§ 371 ("Conspiracy to commit offense or to defraud United States"), and 1546 ("Fraud and misuse of visas, permits, and other entry documents").[2] *Id.* In September 1986, she pleaded guilty to violating 18 U.S.C. § 1546, by making a false statement on her application for adjustment of status. *Id.*

On the same day that Pritchett entered her guilty plea, the INS issued an order to show cause, charging her

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[2] Section 1546 criminalizes, in pertinent part, "any false statement with respect to a material fact in any application, affidavit, or other document required by the immigration laws". 18 U.S.C. § 1546.

with deportability pursuant to § 241(a)(5) of the Immigration and Nationality Act (INA), for having violated 18 U.S.C. § 1546. *Id.* Pritchett was found deportable by the immigration judge. The BIA dismissed her appeal.

In May 1992, Pritchett filed a motion to reopen with the BIA, on the ground that an immediate relative petition had been filed with the INS by her current husband, Roland, whom she had married in May 1987. That July, the BIA denied her motion to reopen. Our court affirmed the BIA's decision in June 1993, and the Supreme Court denied certiorari. *Pritchett,* 993 F.2d 80 (5th Cir.), *cert. denied,* ___ U.S. ___, 114 S. Ct. 345 (1993).

On June 24, 1993, Pritchett again moved the BIA to reopen and/or reconsider, on the ground that she was no longer deportable because of a 1990 amendment to the statute under which she was found deportable. The BIA denied the motion in November 1993, holding that the amendment did not apply to Pritchett's case.

II.

Pritchett contends that the BIA abused its discretion in denying her motion for reconsideration. This contention turns on the applicability of an amendment to the statute under which she was found deportable. "The granting of a motion to reopen is . . . discretionary, and the Attorney General has broad discretion to grant or deny such motions". *Pritchett,* 993 F.2d at 83 (internal quotation marks and citations omitted). "Accordingly, we generally review the BIA's denial of a motion to reopen only for abuse of discretion". *Id.* The applicability of the amendment to INA § 241(a)(5) is a question of law which

we review *de novo*. *Silwany-Rodriguez v. I.N.S.*, 975 F.2d 1157, 1160 (5th Cir. 1992). Our review, however, is limited, because we accord "deference to the Board's interpretation of immigration statutes unless there are compelling indications that the Board's interpretation is wrong". *Id.*

Pritchett was found deportable under former INA § 241(a)(5), 8 U.S.C. § 1251(a)(5), which provided for the deportation of any alien who had been convicted under 18 U.S.C. § 1546. 18 U.S.C. § 1251(a)(5) (1988). Section 241(a)(5) was amended in 1990, by Section 602 of the Immigration Act of 1990, Pub. L. No. 101-649, 104 Stat. 4978 (Nov. 29, 1990), and was renumbered as § 241(a)(3)(B)(iii), and recodified as 8 U.S.C. § 1251(a)(3)(B)(iii). As amended, INA § 241(a)(3)(B)(iii) provides, in relevant part, that "Any alien who at any time has been convicted . . . of a violation of, or a conspiracy to violate, section 1546 of Title 18, (relating to fraud and misuse of visas, permits, and other entry documents), is deportable". 8 U.S.C. § 1251(a)(3)(B)(iii). Pritchett acknowledges that she was deportable under INA § 241(a)(5) (pre-amendment), which was triggered by *any* violation of 18 U.S.C. § 1546. However, because her conviction under 18 U.S.C. § 1546 related to a false statement in an adjustment of status application – which is not an entry document – she maintains that she is no longer deportable under the amended version of the statute, INA § 241(a)(3)(B)(iii), because it applies only to convictions under 18 U.S.C. § 1546, relating to fraud and misuse of visas, permits, or other entry documents.

The BIA held that the amended version of the statute did not apply to Pritchett, relying on section 602(d) of the

Immigration Act of 1990, Pub. L. No. 101-649, 104 Stat. 4978, 5082 (Nov. 29, 1990), which states that "[t]he amendments made by this section . . . shall not apply to deportation proceedings for which notice has been provided to the alien before March 1, 1991". It is undisputed that the order to show cause was served on Pritchett on September 25, 1986. The BIA also noted that our court, in affirming the BIA's previous order, had stated the same position with regard to the applicability of the amendment:

> For deportation proceedings commenced on or after March 1, 1991, the Immigration Act of 1990, Pub. L. No. 101-649, 104 Stat. 4978, revised and renumbered the deportation and admissibility provisions. The anti-fraud provisions under which Pritchett was charged now appear as INA section 241(a)(3)(B). *See* 8 U.S.C. § 1251(a)(3)(B); *compare* 8 U.S.C. § 1251(a)(5) (1988) (pre-amendment version). Because proceedings against Pritchett commenced in September 1986, the deportation aspect of her case remains governed by the earlier provisions. *See* Pub. L. No. 101-649.

Pritchett, 993 F.2d at 82 n.1 (emphasis in original); *see also Rodriguez v. I.N.S.*, 9 F.3d 408, 409-10 n.3 (5th Cir. 1993) (stating, in dicta, that the 1990 amendments to former §§ 241(a)(11) and 241(a)(14) "apply only to deportation proceedings for which notice of a deportation hearing was given on or after March 1, 1991").[3]

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[3] The INS asserts the above-quoted footnote from our court's opinion in Pritchett's prior appeal constitutes the law of the case on the issue of the applicability of the amendment. We

Despite the plain language of Section 602(d) of the Immigration Act of 1990, which expressly provides that the amendments do not apply to proceedings, such as Pritchett's, in which the alien received notice before March 1, 1991, Pritchett contends that a savings clause, in Section 602(c), supports her contention that the amendments apply. That clause provides:

> Notwithstanding the amendments made by this section, any alien who was deportable because of a conviction (before the date of the enactment of this Act) of an offense referred to in paragraph (15), (16), (17), or (18) of section 241(a) of the Immigration and Nationality Act, as in effect before the date of the enactment of this Act, shall be considered to remain so deportable. Except as otherwise specifically provided in such section and subsection (d), the provisions of such section, as amended by this section, shall apply to all aliens described in subsection (a) thereof notwithstanding that (1) any such alien entered the United States before the date of the enactment of this Act, or (2) the facts, by reason of which an alien is described in such subsection, occurred before the date of the enactment of this Act.

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disagree. The applicability of the amendment was not at issue in Pritchett's prior appeal; rather, the issue was whether the BIA abused its discretion in refusing to reopen the deportation proceedings on the basis of Pritchett's husband's petition for an immediate relative visa. *See Pegues v. Morehouse Parish School Bd.*, 706 F.2d 735, 738 (5th Cir. 1983) (obiter dicta does not serve as the basis for application of law of the case doctrine, which operates to foreclose re-examination of decided issues).

Pub. L. No. 101-649, § 602(c), 104 Stat. 5081-82. Pritchett contends that, because the first sentence of the savings clause provides that persons found to be deportable under subsections (15), (16), (17), and (18) of the pre-amendment version of § 241(a) shall remain deportable notwithstanding the 1990 amendments, Congress must have intended that persons found to be deportable under other subsections repealed by the 1990 amendments would not be considered to remain deportable. In other words, Pritchett asserts that, because there is no savings clause relating to former § 241(a)(5) insofar as it deals with deportability for convictions under 18 U.S.C. § 1546 which do not involve fraud related to entry documents, she is no longer deportable because the 1990 amendments repealed that ground for deportability.

Pritchett's interpretation overlooks the second sentence of the savings clause. That sentence provides, in pertinent part, that the amendments shall apply *except* as otherwise specifically provided in, *inter alia*, subsection (d). As stated, that subsection provides that the amendments do not apply to proceedings in which the alien received notice before March 1, 1991. Because Pritchett received notice before then, the BIA correctly held that the amendments do not affect her deportability under former § 241(a)(5).

The BIA's interpretation of the Immigration Act of 1990 is reasonable, and it is consistent with statements in two opinions of our court, including our opinion in Pritchett's prior appeal. The BIA did not abuse its discretion in refusing to reconsider its order of deportability.

III.

For the foregoing reasons, the petition for review is DENIED.

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 93-5546
Summary Calendar

INS Docket No. A26 443 195

LANG FONG PRITCHETT,

Petitioner,

versus

IMMIGRATION AND NATURALIZATION SERVICE,

Respondent.

Petition for Review of an Order
of the Immigration and Naturalization Service

Before KING, HIGGINBOTHAM, and BARKSDALE, Circuit Judges.

JUDGMENT

(Filed July 6, 1994)

This cause came on to be heard on the petition of Lang Fong Pritchett for review of an order of the Immigration and Naturalization Service and was taken under submission on the briefs on file.

ON CONSIDERATION WHEREOF, it is now here ordered and adjudged by this Court that the petition for review in this cause is denied.

IT IS FURTHER ORDERED that petitioner pay to respondent the costs on appeal to be taxed by the Clerk of this Court.

July 6, 1994

U.S. Department of Justice
Executive Office for Immigration Review
Decision of the Board of Immigration Appeals

Falls Church, Virginia 22041

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File: A26 443 195 – Harlingen Date: NOV 22 1993

In re: LANG FONG *TAN* a.k.a. Lang Fong Pritchett

IN DEPORTATION PROCEEDINGS

MOTION

ON BEHALF OF
RESPONDENT: Thomas P. Adams, Esquire
631 St. Charles Avenue
New Orleans, Louisiana 70130

ON BEHALF OF SERVICE: Agnelis L. Reese
General Attorney

CHARGE:

Order: Sec. 241(a)(5), I&N Act [8 U.S.C. § 1251(a)(5)]
– Convicted under 18 U.S.C. § 1546

APPLICATION: Reopening

The respondent's "Motion to Reopen/Reconsider" filed June 24, 1993, will be denied.

In a decision dated April 17, 1992, this Board dismissed the respondent's appeal from the February 22, 1988, decision of the immigration judge which found the respondent deportable under section 241(a)(5) of the Immigration and Nationality Act, 8 U.S.C. § 1251(a)(5), for having been convicted under 18 U.S.C. § 1346, and denied the respondent's request for a continuance of the proceedings pending adjudication of a visa petition filed

on the respondent's behalf. We sustained that part of the respondent's appeal which asserted that deportation should be directed to Honduras in the first instance. Finally, our April 17, 1992, order denied the respondent's second or superseding motion to withhold adjudication based on new law and facts. On July 17, 1992, we denied a motion to reopen filed by the respondent in which she requested reopening to pursue adjustment of status based on a marriage entered into while deportation proceedings were pending, and we denied her motion for a stay of deportation. Our July 17, 1992, decision on the motion to reopen was affirmed by the Court of Appeals for the Fifth Circuit in *Pritchett v. INS,* 993 F.2d 80 (5th Cir. 1993). The respondent has now filed another motion to reopen in which she contends that she is not deportable under the 1990 amended version of former section 241(a)(5) of the Act, and that her proceedings should be reopened or reconsidered. The motion is a motion for reconsideration as it alleges only a change in the law and not new evidence. *See generally Matter of Cerna,* Interim Decision 3161 (BIA 1991). The motion will be denied.

In our decision of April 17, 1993, we specifically noted in footnote 1 that the 1990 amendments to the grounds of deportation were not applicable to this case since the Order to Show Cause in this case was issued well before March 1, 1991. *See* section 602(d) of the Immigration Act of 1990, Pub. L. No. 101-649, 104 Stat. 4978, 5082 (November 29, 1990); *see also Matter of Papazyan,* Interim Decision 3186 (BIA 1992).

The Fifth Circuit in affirming the Board's order of July 17, 1993, stated the same position:

> For deportation proceedings commenced on or after March 1, 1991, the Immigration Act of 1990, Pub. L. No. 101-649, 104 Stat. 4978, revised and renumbered the deportation and admissibility provisions. The anti-fraud provisions under which Pritchett was charged now appear as INA section 241(a)(3)(B). *See* 8 U.S.C. § 1251(a)(3)(B); *compare* 8 U.S.C. § 1251(a)(5) (1988) (pre-amendment version). Because proceedings against Pritchett commenced in September 1986, the deportation aspect of her case remains governed by the earlier provisions. *See* Pub. L. No. 101-649.

Pritchett v. INS, supra, at 82 n.1.

The Order to Show Cause in this case reflects that it was issued on September 24, 1986, and personally served on the respondent on September 25, 1986. As such, regardless of whether the respondent would be found deportable under the 1990 amended version section 241(a)(5), a question we specifically do not address, the amended version simply does not apply. The respondent's deportability as charged remains unchanged. The motion to reconsider will therefore be denied. The respondent's motion for a stay of deportation pending adjudication of her motion in chief will be denied. 8 C.F.R. § 3.8 (1993).

ORDER: The motion to reconsider is denied.

FURTHER ORDER: The motion for a stay of deportation is denied.

/s/ James P. Morris
FOR THE BOARD

UNITED STATES DEPARTMENT OF JUSTICE
EXECUTIVE OFFICE FOR IMMIGRATION REVIEW
IMMIGRATION COURT
NEW ORLEANS, LOUISIANA

FILE #A26 443 195	)	
IN THE MATTER OF:	)	IN DEPORTATION
	)	PROCEEDINGS
FONG TAN LANG	)	

CHARGE: Section 241(a)(5) of the Immigration and Nationality Act, in [sic] you have been convicted under section 1546 of Title 18 of the United States Code.

DECISION OF THE IMMIGRATION JUDGE

UPON the basis of the evidence admitted in the above captioned deportation proceedings I have determined that she is deportable on the charge in the Order to Show Cause.

ORDER: It is ordered that the respondent be deported from the United States to Malaysia on the charge contained in the Order to Show Cause.

Date 22 Feb 1988
Place New Orleans, LA /s/ R. Kevin McHugh
Immigration Judge

Appeal is reserved by the respondent. Notice of appeal is due on 7 March 1988.